(1)
Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

YANKTON SIOUX TRIBE, and its individual members, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Petitioners,

v.

MATT GAFFEY, States Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allotments made under the General Allotment Act, 25 U.S.C. § 331 et seq. cease to be "Indian Country" if the allotments are conveyed to non-Indians.

2. Whether the Yankton Sioux Reservation was diminished by the conveyance of individual Indian allotments to non-Indians in fee simple.

PARTIES TO PROCEEDING BELOW

Petitioner is the Yankton Sioux Tribe and its individual members. A full list of case names and parties is contained in the caption to this petition.

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PETITION FOR WRIT OF CERTIORARI

The Yankton Sioux Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

There are five reported decisions in this matter. The judgment of the Court of Appeals from which the tribe petitions for a writ of certiorari is based upon an opinion reported at 188 F.3d 1010 (August 31, 1999) hereinafter *Yankton II*, rehearing denied December 8, 1999. The District Court opinion is contained at 14 F. Supp. 2d 1135 (D.S.D. 1998).

The above opinions are from proceedings after remand from this Court, in an opinion at 522 U.S. 329, hereinafter, *Yankton I*. *Yankton I* reversed in part the Circuit Court opinion at 99 F.3d 1439 (8th Cir. 1996), vacated 141 F.3d 798 (8th Cir. 1998). The original District Court decision is reported at 890 F. Supp. 878 (D.S.D. 1995).

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. A petition for rehearing was denied on December 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the United States Constitution states in pertinent part:

> All legislative Powers herein granted shall be vested in a Congress of the United States.

U.S. Const. Art. I § 1.

The applicable portion of the General Allotment Act, codified at 25 U.S.C. § 331 states:

> In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or re-surveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the

number or acres of non-irrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him for non-irrigable agricultural or grazing lands: Provided further, That where a treaty or Act of Congress setting apart such reservation herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and non-irrigable lands established in this Act, with the consent of the Indians expressed in such manner as the President in his discretion may require.

28 Stat. 286, 314 (1894 Act) states in part:

ARTICLE I. The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II. In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

18 U.S.C. § 1151(a) states:

Except as otherwise provided in §§ 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the

jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,. . . .

STATEMENT OF THE CASE

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) or *Yankton I*, this Court held that the 1894 Act of Congress (ratifying the 1892 Agreement with the Yankton Sioux Tribe for the sale of approximately 168,000 acres of surplus tribal lands) diminished the reservation by removing from the Reservation the unallotted, ceded lands which were opened for non-Indian settlement. This meant that, in 1894, the Reservation was diminished by approximately 1/3 with the remaining Reservation either held by the United States for tribal benefit, held as federal reserved land,[1] or held by the U.S. as individual trust property. In *Yankton I*, this Court did not need to determine the status of either allotted or federally reserved lands, and the Court explicitly restricted its holding to whether unallotted, ceded lands were severed from the Reservation.

On March 13, 1998, the Yankton Sioux Tribe filed a complaint for injunctive and declaratory relief in the U.S. District Court for the District of South Dakota, requesting judicial clarification that all lands within the original

[1] The "reserved lands" are those lands which were used for agency, school, and other tribal purposes. Under Article VIII of the 1892 agreement, the U.S. agreed not to sell those lands or open them for settlement. 14 F. Supp. at 1159.

boundaries of the Yankton Sioux Reservation not "ceded" by the 1894 Act of Congress constituted Indian Country, thus falling within the jurisdiction of the Yankton Sioux Tribe and the United States.[2] In response, the State erroneously argued that, in *Yankton I*, the Supreme Court determined that the Yankton Sioux Reservation had been disestablished. Federal jurisdiction over the Tribe's complaint was based upon 28 U.S.C. § 1331. That matter was consolidated with the case remanded from the Supreme Court.

Following an evidentiary hearing, and detailed review of the substantial record in this matter, the District Court held that the 53rd Congress had not disestablished the Yankton Sioux Reservation. The Court also held that all allotted lands remained part of the reservation, notwithstanding their fee status. *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1137 (D.S.D. 1998).

The Eight Circuit Court of Appeals upheld in part, and reversed in part, the District Court decision. After applying the proper test to determine whether the Reservation was disestablished, the Circuit Court upheld the District Court ruling that, based upon the unique facts of

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[2] The primary jurisdiction at issue is the Tribe's jurisdiction over tribal member in the former allotments. Tribes have very limited jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (Tribes do not have criminal jurisdiction over non-Indians.); *Montana v. United States*, 450 U.S. 544 (1981) (Tribe's civil jurisdiction over non-members limited to issues impacting tribal welfare and self-government, unless the nonmember has entered into a consensual relation with the Tribe.)

this case, the Reservation had not been disestablished.[3] Contrary to 18 U.S.C. § 1151(a), prior Supreme Court precedent, and the District Court decision, the Circuit Court then determined that, although the Reservation was not disestablished in 1894, Congress intended that allotted lands that passed out of Indian hands subsequent to 1894 ceased to be "Indian Country" as that term is defined at 18 U.S.C. § 1151. The position adopted by the Circuit Court had not been briefed or argued by any party to the case.

DISCUSSION OF LAW

I. THE EIGHTH CIRCUIT COURT DECISION IS IN CONFLICT WITH SETTLED LAW THAT ALLOTTED LANDS RETAIN THEIR RESERVATION STATUS NOTWITHSTANDING THE ISSUANCE OF FEE PATENT.

The fundamental question in the captioned matter is whether allotted lands, which retained their reservation status after the Yankton Sioux Indian Reservation was allotted in 1894, ceased to be part of the Reservation if they were subsequently conveyed to non-Indian ownership. Although this Court has held that this issue has been "squarely put to rest" both by Supreme Court case law and federal statute, *Solem v. Bartlett*, 465 U.S. 463 (1984), the Eighth Circuit did not follow those binding authorities. The Supreme Court must grant the writ of

[3] The Tribe does not petition for review of the fact-based determination that the Reservation was not disestablished.

certiorari and again re-settle this important issue of law. Until this issue is resolved, it will arise repeatedly in litigation involving Indian Tribes throughout the continental United States, and it will return to this Court until resolved.[4]

The allotments at issue were Reservation in 1894. The Eighth Circuit Court of Appeals correctly held that the 1894 Congress diminished, but did not disestablish the Reservation. *Yankton II*, at 1028, 1030. The Court also held that in 1894 the Reservation comprised all lands within the exterior boundaries of the Reservation, except the ceded lands conveyed to the United States and opened to non-Indian settlement. *Yankton II*, at 1028, 1030. Thus, in 1894, the Reservation contained approximately 260,000 acres of allotments, *Yankton II*, at 1013, n.3, and additional land held by the United States but reserved and not open for settlement. *Yankton II*, at 1030.

Allotment of the Yankton Sioux Reservation was made under the General Allotment Act of 1887. *Yankton I*, at 1013, n.3; 14 F. Supp. 2d at 1140-41. After Congress approved the 1894 Act, many Indians received fee title patents to their allotted lands. Fee patents to those lands were issued under the General Allotment Act, as subsequently modified by the Burke Act.[5] The policies of allotment and fee patenting of land were later repudiated by

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[4] As discussed more fully below, the Circuit Court decision would substantially affect federal and tribal court jurisdiction, and would void many prior decisions of those Courts.

[5] Under these acts, fee patents could issue at the completion of the trust period, or under the inconsistently executed Burke Act, *see Felix S. Cohen's Handbook of Federal Indian Law* 136-138 (1982). Fee patents also frequently issued

administrative practice and by subsequent acts of Congress. 25 U.S.C. § 352(a) (Cancellation Act); 25 U.S.C. § 461 et seq. (Indian Reorganization Act).

Contrary to settled law regarding the effect of allotments and subsequent fee-patenting of such land, the Eighth Circuit Court of Appeals held that if a patent issued and the land "passed out of Indian hands", it ceased to be part of the Reservation. *Yankton II*, at 1028, 1030.[6] The Circuit Court held that, between 1894 and the end of fee-patenting of land in 1934, the Reservation was further diminished from 260,000 acres to approximately 36,000 acres. *Id.* at 1030. The Circuit Court decision is contrary to 100 years of Supreme Court precedent that former allotments continue to be Reservation land notwithstanding the subsequent fee-patent or conveyance of allotments to non-Indians. *Solem v. Bartlett*, 465 U.S. 463 (1984). In 1948 Congress adopted and codified these Supreme Court precedents at 18 U.S.C. § 1151(a).[7]

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upon death of the allottee. 25 U.S.C. § 373 (testate succession); 25 U.S.C. § 348 (intestate succession).

Allotments are conveyed to non-Indians by sale, through probate, or through foreclosure, including tax foreclosure. *See, e.g., Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987)

[6] Allotments for which fee patents were not issued or which were retained by Indians remain Reservation to this day under the Circuit Court decision. *Yankton II*, at 1030.

[7] As discussed more fully at page 21, the State has acknowledged that the Circuit decision was contrary to this clearly established precedent.

A. The Circuit Court decision is contrary to consistent, well-reasoned decisions of the Supreme Court on this issue of law.

The Circuit Court decision is in conflict with repeated decisions of the Supreme Court that hold that, unless a reservation is disestablished, former allotments unquestionably remain "Indian Country," whether or not they have been transferred to non-Indian ownership. *Solem v. Bartlett*, 465 U.S. 463 (1984); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Celestine*, 215 U.S. 278 (1909).

There is simply no decision from this Court or any Circuit Court, other than the Eighth Circuit decision at issue, that holds that an Indian Reservation has not been disestablished, but which then holds that the Reservation is diminished by the later conveyance to non-Indians of allotted land. That view, repeatedly rejected by the Supreme Court, represents an aberration which, unless reversed, will destabilize land tenure and jurisdiction on reservations throughout the Circuit and lead to conflicts of law elsewhere.

Yankton I is the seventh case in which the Supreme Court has ruled on whether the policy of allotment and the opening of an Indian reservation to settlement by non-Indians diminished or disestablished a reservation. *Hagen v. Utah*, 114 S.Ct. 958 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v.*

Superintendent, 368 U.S. 351 (1962).[8] In *DeCoteau*, the Sisseton/Wahpeton Tribe approved termination of its Reservation. Because the Reservation no longer existed, the allotments and fee patent lands were not part of the Reservation. In the remaining cases, when termination had not been approved by the Tribe, this Court recognized that former allotments that were on the Reservation remained part of the Reservation. Unlike *DeCoteau*, the Yankton Sioux Reservation has not been disestablished. As in all cases where the Reservation was not disestablished, the allotments are part of the Reservation.

The Court has addressed the status of former allotments in several other contexts, consistently holding that allotted lands remain part of the Reservation, notwithstanding the issuance of any patent. *Montana v. U.S.*, 450 U.S. 544 (1981) ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers."); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (Indians living on former allotments on reservation enjoy same immunity from state tax as Indians living on trust land); *U.S. v. John*, 437 U.S. 634 (1978); *U.S. v. Nice*, 241 U.S. 591 (1916) ("The act of 1889 [applying the General Allotment Act to the

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[8] The importance of diminishment and disestablishment cases is demonstrated by the fact that the Court has heard seven of these cases. The Tribe has only found one disestablishment or diminishment case where the Court denied certiorari. *Duchesne Country v. Ute Tribe of Uintah, Ouray Reservation*, 522 U.S. 1107 (1998) (Petition for writ of certiorari brought by County.).

Rosebud Sioux Reservation] recognized the existence of the tribe, as such, and plainly disclosed that the tribal relation, although ultimately to be dissolved, was not to be disestablished by the making or taking of allotments." The federal government therefore retained jurisdiction over allotments.); *United States v. Pelican*, 232 U.S. 442 (1914) (Federal Court has jurisdiction over allotments.) Again all of these cases are contrary to the Circuit Court decision in this matter.

The consistent holdings of the Supreme Court are based upon the intent of the General Allotment Act of 1887 and the subsequent legislation designed to carry out that Act. In accordance with congressional intent of the above legislation, and acknowledgment of the federal government's continuing trust relationship with Indian Tribes, this Court has held:

> The first governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem v. Bartlett, 465 U.S. 463, 470 (1984); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), *citing United States v. Celestine*, 215 U.S. 278 (1909); *Hagen v. Utah*, 510 U.S. 399 (1994). Congress' intent to diminish a reservation must be "clear and plain." *United States v. Dion*, 476 U.S. 734 (1986).

Applying these principles, this Court has consistently interpreted the intent of Congress expressed in the General Allotment Act, and in subsequent acts like the 1894 Act at issue in the present case, to be:

> . . . to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted *and* the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115 – 117, 127 – 129, 776 – 777 (1958). (Emphasis added.)

Mattz v. Arnett, 412 U.S. 481, 496 (1973).

In *Mattz*, the issue was whether the Klamath River Reservation had been disestablished. That decision turned on the interpretation of an 1892 Act of Congress designed to carry out the General Allotment Act. The Supreme Court held the 1892 Act had to be interpreted "from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388."

Like *Mattz*, the 1894 Act at issue was adopted to carry out the General Allotment Act and, as in *Mattz*, the 1894 Act was to be interpreted in light of the purpose behind the General Allotment Act. The Supreme Court has properly interpreted the General Allotment Act consistent with the continuing federal trust responsibilities that form the basis of the federal relationship with Tribes

and Indians. It should insist that the Eighth Circuit follow this Court's rulings.

The Court below did not interpret the 1894 Act consistent with the purposes and policies of the General Allotment Act. The 1894 Congress' intent was based upon allotment and patent laws as they existed in 1894. Statutes related to patenting of allotments were subsequently changed by 34 Stat. § 325, 326 (codified at 25 U.S.C. § 391) (President is given discretion to extend the trust period of any allottee) and by the Burke Act of 1906 (codified at 25 U.S.C. § 349) (Secretary of Interior is given authority to issue fee patents before the expiration of the trust period). Many tribal allotments passed under the Burke Act and other evolving federal policies, not under the law as it existed in 1894. 14 F. Supp. 2d 1135, 1151 (D.S.D. 1998).

Inexplicably, the Circuit Court interprets the 1894 Congress' intent to be that tribal land would pass to non-Indians under subsequent, substantial, unanticipated changes to fee patent law. For example, in 1894, Congress knew that one of the major protections of Indian allotments was the twenty-five year trust period. That protection was eliminated by the subsequent changes to federal law under the Burke Act. In that Act, Congress gave the Secretary of the Interior discretion to issue fee patents prior to expiration of the twenty-five year trust period which existed in 1894. The Secretary used that discretion to issue patents to Yankton Sioux members even though the Secretary knew that most Yankton Sioux (and most other Indians) fell victim to tax sale foreclosures and land speculators. *Felix S. Cohen's Handbook of Federal Indian Law*

136-138 (1982); Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934*, 93-102 (1991).

In 1894 Congress knew that Indians were not prepared for non-Indian land tenure laws, and intended to protect the Indians from loss of the land. The history of the Burke Act demonstrates that the 1894 Congress was correct. The Burke Act was obviously a major change in policy from that intended by the 1894 Congress. Contrary to the Circuit Court decision, the 1894 Congress did not intend the wholesale loss of tribal allotments through the policies later established by the Burke Act.

While the 1894 Congress' long-term goal may have been to eventually disestablish all reservations, the General Allotment Act was only one step toward that goal. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). The Supreme Court has consistently held that the step toward termination made by the General Allotment Act was not sufficient to remove allotments from existing reservations, notwithstanding the subsequent issuance of fee patents or conveyance to non-Indians. To remove allotments from Reservations would have required further steps by Congress, and Congress took no additional steps with regard to Yankton Sioux allotments.

This Court should grant the writ of certiorari in this matter to review the Circuit Court decision which overrules this well-established line of Supreme Court cases.

B. The Circuit Court decision directly conflicts with 18 U.S.C. § 1151(a).

18 U.S.C. § 1151(a) states:

> Except as otherwise provided in §§ 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,. . . .

The Supreme Court has noted that 18 U.S.C. § 1151 adopted and codified Supreme Court holdings which defined Indian Country. *U.S. v. John*, 437 U.S. 634, 648 (1978).[9] Since 18 U.S.C. § 1151's enactment in 1948, the Supreme Court has repeatedly cited the statute as the correct and definitive definition of Indian Country. *See, e.g., Solem*, 465 U.S. 463; *U.S. v. John*, 437 U.S. 634; *DeCoteau*, 420 U.S. 425; *Kennerly v. District Court*, 400 U.S. 423 (1971). In an unambiguous holding, this Court stated that the question of whether former allotments continued to be Reservation was:

> Squarely put to rest by congressional enactment of the currently prevailing definition of Indian Country in § 1151 to include "all land within the

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[9] Although 18 U.S.C. § 1151 defines "Indian Country" only for purposes of criminal jurisdiction, the Court applies that definition in both criminal and civil cases. *DeCoteau v. District County Court*, 420 U.S., at 427, n.2; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, at n.5 (1987).

> limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent. . . .

Seymour v. Superintendent, 368 U.S. at 357-58.

The Eighth Circuit decision is unquestionably contrary to the statute. The Circuit Court held:

> For these reasons, we hold that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151.

188 F.3d at 1030.

In its petition for rehearing by the Eighth Circuit, the State noted this same error by the Circuit Court panel. The State wrote:

> were the allotments on the former Yankton reservation deemed reservation under 18 U.S.C. § 1151(a) they would not lose Indian Country status when the Indian title was extinguished. This, however, is flatly inconsistent with the body of the Panel Opinion which held that the reservation was diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands.

State Petition for En Banc Review, at 13.

As the Court clearly stated in *Seymour*, prior to the Eighth Circuit decision, the statute was the settled, relied upon, and clear definition of Indian Country throughout the United States. The Supreme Court should grant the

writ of certiorari to review the Eighth Circuit change to this well-settled law.

II. CORRECTION OF THE CIRCUIT COURT ERROR IS OF EXCEPTIONAL IMPORTANCE TO INDIAN TRIBES AND PEOPLE LIVING ON FORMER ALLOTMENTS THROUGHOUT THE UNITED STATES.

A. The Circuit decision will lead to sizable divestiture of land from Indian Tribes within the 48 contiguous states.

Adopting a view consistently rejected by the Supreme Court, the Circuit Court found that Congress intended lands which passed under to non-Indians under the General Allotment Act would cease to be Reservation land. Unless reversed, the Circuit Court view will disrupt tribal relations with the United States and cause great destruction to the very fabric of tribal government and institutions. Land on 118 reservations passed to non-Indian ownership under the General Allotment Act. Richard B. Morris, *Encyclopedia of American History* 644 (6th ed. 1982). The amount of land allotted to Indians and subsequently conveyed to non-Indians was 27,000,000 acres. *Felix S. Cohen's Handbook of Federal Indian Law* 138 (1982).[10]

The novel and far-reaching Circuit Court decision should only have been reached upon a careful consideration and analysis of Supreme Court precedents. Instead

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[10] 27,000,000 acres is approximately the size of the state of Ohio. There are 16 states which are less than 27,000,000 acres.

the Circuit Court made its sweeping change to the law in a cursory manner, in a single sentence of the Court's twenty page opinion, where the Court states:

> When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non-Indian hands. (Footnotes and citations *not* omitted.)

188 F.3d at 1030.

By threatening to disturb the status of the law that for years has maintained a semblance of jurisdictional stability in Indian Country, the Circuit Court ruling in this case will substantially harm the Yankton Sioux Tribe and other Indian Tribes and reservations throughout the Nation. Both Indian tribes and non-Indian communities that previously relied upon 18 U.S.C. § 1151(a) and the long line of United States Supreme Court cases in this area of the law will be thrown into jurisdictional limbo and chaos.

B. Removal of allotments from Reservations will upset the finality of innumerable federal and tribal court decisions.

The jurisdictional uncertainty created by the Circuit Court decision affects far more than just land: it affects the validity of decisions of tribal and federal courts. Tribal Courts exercise jurisdiction over "Indian Country" as that term is defined by federal law. The Circuit Court's radical redefinition of "Indian Country" will void innumerable tribal court decisions. There are over 250 tribal

courts in the United States. Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 Judicature 147, 149, Nov.-Dec. 1995. Caseload in these courts varies, depending on the size and population of the reservation. For example, the Navajo Court handles approximately 25,000 cases per year, while the Gila River Reservation handles 3,200 cases per year. J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 Judicature 150, 152, Nov.-Dec. 1995.

Based upon the heretofore settled law, these tribal courts have long exercised jurisdiction over Indians on former allotments. Tribal Courts hear criminal trials, termination of parental rights, adoptions, child custody and support, dissolution of marriage, probate, tort cases, employment appeals, and general civil cases. Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 American Indian Law Review, 285, 1998. Tribal court orders are frequently afforded recognition by other courts under principles of comity and federal law.

The Circuit Court casts intolerable uncertainty over tribal and federal court decisions that arose on former allotments. For example, the decision is precedent to void long-settled tribal court adoptions. The decision will create disorder related to tribal court orders of dissolution of marriages, and acts in reliance thereon. After a dissolution, a party is free to remarry, and the dissolution affects the interpretation of wills and alters intestate succession. People, especially tribal people, rely upon these and other decisions of tribal courts. The Yankton Sioux Tribe asks the Court to review the Eighth Circuit Court decision and to restore certainty to the status of former allotments and certainty to the jurisdiction of tribal courts.

III. THE EIGHT CIRCUIT OPINION IS IN DIRECT CONFLICT WITH A DECISION OF THE TENTH CIRCUIT COURT OF APPEALS.

The opinion in the instant case is in direct conflict with the Tenth Circuit Court of Appeals on an important issue of law.[11] *See Ute Indian Tribe of the Unitah and Ouray Reservation v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997).

In *Ute*, as in the present case, the Circuit Court was required to apply Supreme Court precedent to determine the status of former allotments, where the Reservation had been diminished by the sale of "surplus" property scattered throughout the Reservation. Contrary to the Eighth Circuit decision in the present case, the Tenth Circuit held that the former allotments remain part of the Reservation.

In the 1980's, the Ute Indian Tribe brought an action for injunction and declaratory judgment against the State of Utah, joining also Duchesne Country, Uintah County and Roosevelt City as defendants. The Federal District Court for Utah held that the Uncompahgre Reservation had been disestablished, but that the Uintah and Ouray Reservation had not been disestablished, except as to

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[11] For some areas of law, the Court might be inclined to wait until more of the thirteen Circuit Courts reach an issue. Because the captioned matter relates to diminishment of reservations, which are concentrated in the western United States, the Eighth and Tenth Circuits are two of the three Circuits where the issue is likely to arise. A disagreement between these two circuits on an issue of this importance to Indian law must be resolved.

lands that had been specifically removed from the Reservation for other purposes. *Ute Indian Tribe v. State of Utah, et al.*, 521 F. Supp. 1072 (D. Utah 1981), *aff'd. en banc*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986). After extended litigation, a separate case dealing with the status of the Ute Reservation ended up in the Supreme Court. *Hagen v. Utah*, 510 U.S. 399 (1994).

In *Hagen*, Justice O'Connor, writing for the Court, ruled that the Uintah Valley Reservation was diminished, but not disestablished or terminated. Following the *Hagen* decision, the State of Utah and other local parties began pushing their case back through the federal courts, ultimately asking the Tenth Circuit Court to withdraw completely its earlier mandate which held, as did this Court in *Yankton I*, that the Reservation was neither diminished nor disestablished. In response to that request, and in view of the *Hagen* decision the Tenth Circuit, held:

> To the extent that the boundary determinations made in the *Ute Indian Tribe III* (in which the Tenth Circuit ruled *en banc* that the Reservation boundaries were neither diminished nor disestablished) do not directly conflict with *Hagen*, they remain in effect.

Ute Indian Tribe of the Unitah and Ouray Reservation v. State of Utah, 114 F.3d 1513, 1528 (10th Cir. 1997).

> Moreover, the diminishment was only with respect to those lands which had been restored to the public domain under the 1902-1905 legislation. (Citations omitted) . . . In sum *Hagen* does not conflict with our holding in *Ute Indian Tribe III* that these categories of non-trust lands

> remain within Indian Country under section 1151(a).

Ute Indian Tribe, at 1530.

If the Yankton Sioux Reservation were located within the Tenth Circuit, it would consist of 260,000 acres, instead of the 36,000 acre Reservation as held by the Eighth Circuit Court of Appeals. The Tribe respectfully requests that the Court resolve this conflict between Circuit Court decisions.

CONCLUSION

The Yankton Sioux Tribe respectfully requests that the Court grant the writ of certiorari. The sweeping, unprecedented change in federal Indian law made by the Eighth Circuit should command the full attention of the Court. This Court should intervene to prevent the foreseeable legal chaos which will result from the Circuit Court's unprecedented decision.

Respectfully submitted,

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